

D.P.U. 93-DS-13

Adjudicatory hearing in the matter of a possible violation of General Laws, Chapter 82, Section 40, by Gallagher Construction Company.

APPEARANCES: Tony Gallagher, Vice-President
Gallagher Construction Company
241 Bridge Road
Salisbury, Massachusetts 01952
FOR: GALLAGHER CONSTRUCTION COMPANY
Respondent

Gail Soares, Dig-Safe Investigator
Division of Pipeline Engineering and Safety
Department of Public Utilities
Boston, Massachusetts 02202
FOR: THE PIPELINE ENGINEERING AND SAFETY
DIVISION

I. INTRODUCTION

On July 6, 1993, the Pipeline Engineering and Safety Division ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to Gallagher Construction Company ("Respondent"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on June 16, 1993 on Bridge Road in Salisbury, in violation of G.L. c. 82, § 40 ("Dig-Safe law"). The NOPV alleged that the Respondent had failed to render proper notice and use reasonable precautions while excavating, causing damage to an underground facility operated by Essex County Gas Company ("Essex County Gas" or "Company"). The NOPV also stated that the Respondent had the right to either appear before a Division hearing officer in an informal conference on August 4, 1993, or send a written reply to the Division by that date.

In a letter dated July 12, 1993, the Respondent informed the Division that on June 16, 1993 at Bridge Road,¹ it was only removing a bush with a hand shovel and did not use a backhoe for digging purposes, and therefore, had not violated the Dig-Safe law. In a letter dated July 13, 1993, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe law and informed the Respondent of its right to request an adjudicatory

¹ A discrepancy exists in the record concerning the exact address on Bridge Road where the damage occurred (Tr. at 8, 11, 13, 26; Exhs. D-1; D-3). The Respondent contended in its July 12, 1993 letter that the address in dispute is 141 Bridge Road (Exh. D-3). Although the NOPV is silent as to the exact address on Bridge Road, the underground damage report rendered by the Company that the NOPV is based upon and all testimony given by both parties on the record concerns Rear 227 Bridge Road (Exhs. D-1; D-2; D-3; D-6). Because the July 12, 1993 letter of the Respondent was not a sworn statement, and is contradicted in terms of address by all other evidence and testimony, the Department construes the location of the excavation(s) to be Rear 227 Bridge Road in Salisbury.

hearing. On July 19, 1993, consistent with the regulations of 220 C.M.R. § 99.07(3), the Respondent requested an adjudicatory hearing. After due notice, an adjudicatory hearing was held on March 24, 1994, pursuant to the Department's procedures for enforcement of the Dig-Safe law under 220 C.M.R. §§ 99.00 et seq.

At the hearing, Gail Soares, a Dig-Safe investigator, appeared on behalf of the Division. Roger Perkins, a crew chief for Essex County Gas, and Kurt Frampton, an assistant distribution manager for Essex County Gas, testified on behalf of the Division. Tony Gallagher, vice-president of Gallagher Construction Company, testified for the Respondent. Eight exhibits were entered into the record as evidence, six by the Division and two by the Respondent.

II. SUMMARY OF FACTS

A. The Division

The Division alleges that the Respondent failed to render proper notice and use reasonable precautions while excavating on June 16, 1993 at Rear 227 Bridge Road in Salisbury, which resulted in damage to a half-inch underground gas service line (Tr. at 5, 19; Exhs. D-1; D-2).

In support of the allegation regarding a lack of proper notice, Kurt Frampton stated that the Company had received no notification from Dig-Safe System, Incorporated ("Dig-Safe"),² or other notification directly from the Respondent, prior to the Respondent's excavation on June 16, 1993 at Rear 227 Bridge Road (Tr. at 8-9). Gail Soares stated that although the Respondent was excavating a bush, he was still required by the Dig-Safe law to call for a proper

² Dig-Safe is a non-profit organization that exists for the express purpose of gathering information on proposed excavations from excavators, and disseminating that information to utility companies so that they can properly mark their underground facilities before excavation begins. See G.L. c. 82, § 40.

marking, which requires an accurate description of the site to be excavated, and a 72-hour waiting period before excavation (id. at 18-19).

According to the Division, the Respondent called the Company to report the instant damage on June 16, 1993, approximately within an hour after the damage occurred (Tr. at 11, 14; Exh. D-1). Roger Perkins, the Company representative who was sent to Rear 227 Bridge Road to investigate and repair any damage, testified that when he arrived at the scene, no markings of any type were visible in the area of the gas main (Tr. at 16).³ Mr. Perkins also stated that a call to the Company or Dig-Safe probably would have helped to avoid the instant damage (id.).

Gail Soares contended that the damage was prima facie evidence that the Respondent failed to use reasonable precautions during excavation (id. at 19). In further support of the allegation that the Respondent failed to use reasonable precautions while excavating, Mr. Perkins stated that when he arrived at Rear 227 Bridge Road, he observed a recently excavated hole in the middle of the driveway that was filled with water from a broken water pipe, and had gas bubbling up from beneath the water (id. at 11-12, 15). Mr. Perkins further testified that the Company's gas service line had been broken in half, and that it was certain that the hole had been dug and damage done with the Respondent's backhoe (id. at 14-15). Mr. Perkins also testified that the Respondent had helped him further excavate the hole with the Respondent's backhoe to expedite repair of the broken gas and water mains (id. at 15).

B. The Respondent

³ Mr. Perkins opined that he was at the scene within an hour of when the damage was done (Tr. at 14).

Tony Gallagher testified that the original project at Rear 227 Bridge Road on June 16, 1993 was to remove a bush located between the house and driveway (Tr. at 21; Exh. D-3). The Respondent makes no claim that it notified Dig-Safe before the removal of the bush and in fact, asserts that it did not have to notify Dig-Safe because no inappropriate digging had occurred (Tr. at 21, 23-24, 28; Exh. D-3). Mr. Gallagher further testified that while removing the bush, he "incurred" a water leak, which prompted him to excavate in the driveway in an attempt to "correct" the loss of "a lot of water" (Tr. at 21, 23, 25).⁴

Mr. Gallagher contended that the water leak was a "major water problem" due to the fact that a baby lived at Rear 227 Bridge Road and because the leak affected water service for two households; Mr. Gallagher further contended that because of these circumstances, he chose to excavate in the driveway immediately and did not call Dig-Safe (id. at 23, 25-26). However, Mr. Gallagher testified that he was operating the backhoe that caused the damage while he was excavating to repair the water leak; he conceded that he was "lax" and "negligent" by not notifying Dig-Safe prior to the excavation in the driveway (id. at 21, 23-24, 28). Under questioning from the bench, Mr. Gallagher also testified that he was aware of the option in an emergency situation to excavate first and call Dig-Safe as soon as possible (id. at 26). In addition,

⁴ On the record, the Respondent refers to the excavation of the driveway as the first excavation because the Respondent contends that the removal of the bush was not an excavation (Tr. at 23, 25; Exh. D-3). The excavation the Respondent refers to as the second excavation is an excavation at the same site that took place approximately one week after the excavation of the bush and driveway (Tr. at 21, 25-27). Because the NOPV and allegations of the Division concern only the excavations that occurred on June 16, 1993, the Department will only address the excavations made on that date (Exh. D-2).

Mr. Gallagher testified that the only further precautions he could have taken to avoid damage would have been to call Dig-Safe before he excavated in the middle of the driveway (id.).

III. STANDARD OF REVIEW

G.L. c. 82, § 40, in pertinent part, provides that:

No person shall, except in an emergency, contract for, or make an excavation ... which shall not be deemed to include gardening or tilling the soil in the case of privately owned land ... unless at least seventy-two hours, exclusive of Saturdays, Sundays and legal holidays ... before the proposed excavation is to be made such person has given an initial notice in writing of the proposed excavation to such natural gas pipeline companies ... in or to the city or town where such excavation is to be made.

The statute is clear and unambiguous. Any company, contractor or person must properly notify the appropriate operators of underground utilities at least 72 hours before beginning an excavation. Industrial Contractors and Developers, D.P.U. 86-DS-25, at 4 (1988); John Farmer, D.P.U. 86-DS-102, at 4 (1987).

The Department's regulations at 220 C.M.R. § 99.02 define excavation as:

... the movement or removal of earth, rock, ledge or other materials in the ground to form a cavity, hole, hollow or passage therein. It shall include, but not be limited to digging; trenching; grading; scooping; tunneling; augering; ... [or the] demolition of any structure Excavation shall not mean gardening or tilling the soil in the case of privately owned land.

220 C.M.R. § 99.02 also defines an emergency situation as an event or situation that:

(a) causes an imminent threat to the public health or safety; (b) causes an imminent, considerable and unanticipated threat of loss of physical property; and/or (c) requires immediate and unanticipated correction to ensure electric, telecommunications, gas, water, sewer or cable television service. For the purposes of 220 CMR 99.00, the term "unanticipated" shall not include threats which could have been reasonably anticipated.

Any party excavating in an emergency situation must provide proper notice at the earliest possible moment. Toll Brothers, D.P.U. 91-DS-51, at 6-7 (1994); Pepperell Water Company, D.P.U. 86-DS-70, at 2 (1987).⁵

In relation to reasonable precautions, G.L. c. 82, § 40 states in pertinent part:

Any such excavation shall be performed in such manner, and such reasonable precautions taken to avoid damage to the pipes, mains, wires or conduits in use under the surface of said public way ... including, but not limited to, any substantial weakening of structural or lateral support of such pipe, main, wire, or conduit, penetration or destruction of any pipe, main, wire or the protective coating thereof, or the severance of any pipe, main or conduit.

The making of an excavation without providing any or all notice or notices required by this section with respect to any proposed excavation which results in any damage to a pipe, main, wire or conduit or its protective coating shall be prima facie evidence in any legal or administrative proceeding that such damage was caused by the negligence of such person.

The Department has held that although damage during an excavation without notice may be prima facie evidence of the excavator's negligence under the Dig-Safe law, the mere fact of damage does not itself constitute a violation of the statute, when such evidence is controverted by

⁵ 220 C.M.R. § 99.03 states:

(1) If, because of an emergency, an excavator is unable to give notice to the company sooner than 72 hours ... as required by M.G.L. c. 82, § 40, before beginning excavation, the excavator may commence excavating after having taken all reasonable steps, consistent with the urgency of the emergency need to excavate, to notify each company providing gas, electric, telephone or cable television services in or to the city or town where the excavation is to be performed.

(2) Notwithstanding the provisions of 220 C.M.R. § 99.03 (1), an excavator must notify said company or companies forthwith upon determining that an emergency exists requiring excavation sooner than the expiration of the 72-hour notice period.

credible evidence. Umbro & Sons, D.P.U. 91-DS-4, at 5-6 (1992), citing Yukna v. Boston Gas Company, 1 Mass. App. Ct. 62 (1973).

"Reasonable precautions" is not defined in the statute or the Department's regulations, nor do regulations specify approved conduct. Instead, case precedent has guided the Department in this area. In order for the Department to justly construct a case against an alleged violator of the Dig-Safe law for a failure to exercise reasonable precautions, adequate support or evidence must accompany that allegation. New England Excavating, D.P.U. 89-DS-116, at 9-10 (1993); Fed. Corp., D.P.U. 91-DS-2, at 5-6. In specific instances where there has been an allegation of a failure to exercise reasonable precautions without demonstrations of precautions the excavator could or should have taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Umbro & Sons, *supra* at 6-8; Fed. Corp., *supra* at 5-6; Albanese Brothers, Inc., D.P.U. 88-DS-7, at 4-5 (1990). For example, several cases have established the proposition that using a machine to expose facilities, rather than hand-digging, constitutes a failure to exercise reasonable precautions. See Cairns & Sons, Inc., D.P.U. 89-DS-15, at 5-6 (1990); Petricca Construction Company, D.P.U. 88-DS-31, at 5 (1990); John Mahoney Construction Company, D.P.U. 88-DS-45, at 4-5 (1990). However, where hand-digging to locate facilities was found to be impossible, the Department has found use of a Gradall backhoe to be reasonable when the Division failed to set forth a reasonable alternative the excavator could have taken to avoid damage. New England Excavating, *supra* at 8-11; Fed. Corp., *supra* at 5-6 (1992).

IV. ANALYSIS AND FINDINGS

The main issues to be decided in this case are: (1) whether the Respondent failed to render proper notice for the excavation⁶ at Rear 227 Bridge Road; and (2) whether the Respondent used reasonable precautions to protect underground facilities during the excavation.

In addressing whether the Respondent rendered proper notice before excavation of the bush and driveway, the Department looks to the governing statutes and regulations, which state that any excavation on public or private property, regardless of whether damage results, with the sole exceptions of gardening or emergencies, requires 72-hour notification to Dig-Safe or all companies with underground utilities in the area of excavation, before that excavation begins. G.L. c. 82, § 40, supra; 220 C.M.R. § 99.02, supra. The Respondent's activities constituted excavation and the Respondent made no claim that he met either of the exceptions to the notice requirement.⁷ The Respondent also made no claim that notification of the excavations were given to the Company before the excavation commenced. Accordingly, the Department finds that the Respondent violated the Dig-Safe law by failing to render proper notice before excavating at Rear 227 Bridge Street.

The next issue is whether the Respondent's excavation without notification, which resulted in damage at Rear 227 Bridge Road, constituted a failure to use reasonable precautions, in

⁶ The Respondent originally intended to remove a bush at this address; when the removal resulted in a water leak, the Respondent excavated the driveway in order to stop the leak. The Department considers the situation to be one excavation, which occurred in two stages. Where appropriate, the Department will address the different stages.

⁷ The Respondent did not claim to be gardening. His justification for the part of the excavation that occurred in the driveway: to stop the water leak, does not meet the Department's standard for the emergency exception to notice. See 220 C.M.R. § 99.02; Boston Gas Company, D.P.U. 86-DS-166, at 5 (1990). Furthermore, the failure to notify Dig-Safe of the excavation of the bush is a violation of the law.

violation of the Dig-Safe law. As a threshold matter, we note that, under G.L. c. 82, § 40, excavation without proper notice which results in damage is prima facie evidence that the damage was caused by negligence.⁸ However, the Department has held that although damage during an excavation without notice may be prima facie evidence of the excavator's negligence under the Dig-Safe law, the mere fact of damage does not itself constitute a violation of the statute when such evidence is controverted by credible evidence. Umbro, supra at 5-6 (citing Yukna v. Boston Gas Company, 1 Mass. App. Ct. 62 (1973)).

In order to justly construct a case against an alleged violator of the Dig-Safe law for a failure to exercise reasonable precautions, adequate evidence must accompany that allegation, including evidence about the availability of other precautions to avoid damage. New England Excavating, supra; Fed. Corp., supra. Here, the evidence was contradictory on the cause of the damage. Although the Division presented a letter from the Respondent which indicated that the roots of the bush that was removed had wrapped themselves around the gas line and dislodged it when the bush was excavated, at the hearing, the witness for the Division testified that the gas service line was broken with a backhoe during the excavation of the driveway, without objection by the Respondent. However, the Division provided no evidence that hand-digging or some other alternative method of excavation would have been superior to the methods used by the Respondent during its excavation. In fact, when asked what other precautions the Respondent

⁸ With respect to the damaging of underground facilities, because the Department was only given the authority to enforce the Dig-Safe law, which does not include determinations of negligence, the Department is not the appropriate forum in which to litigate a dispute involving issues of negligence. See St. 1985, c. 777, § 1. Accordingly, the issue of the Respondent's negligence is not addressed here.

could have taken to avoid damage, the Division's principal witness echoed the Respondent's statements that he should have called Dig-Safe before excavating, but did not mention other excavating methods that would have been safer under the conditions. Because the Division has not provided adequate evidence that a failure to use reasonable precautions by the Respondent caused damage to the Company's facility, the Department cannot find that the Respondent failed to use reasonable precautions in the excavation. Accordingly, the Department finds that the Respondent did not violate the Dig-Safe law by failing to use reasonable precautions during excavation.

In summary, the Respondent violated the Dig-Safe law by failing to properly notify the Company or Dig-Safe before excavating at Rear 227 Bridge Road in Salisbury, Massachusetts on June 16, 1993. The Department notes that this is the first violation of the Dig-Safe law by the Respondent.

V. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That Gallagher Construction Company violated the Dig-Safe law on June 16, 1993 by failing to properly notify the Company of the excavation at Rear 227 Bridge Road in Salisbury, Massachusetts; and it is

ORDERED: That Gallagher Construction Company, being a first-time violator of the Dig-Safe law, shall pay a civil penalty of \$200 to the Commonwealth of Massachusetts by submitting a check or money order in that amount to the Secretary of the Department of Public Utilities, payable to the Commonwealth of Massachusetts, within 30 days of the date of this Order.

By Order of the Department,

Kenneth Gordon, Chairman

Mary Clark Webster, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971)

Misc. Text

G.L. c. 82, § 40 states in pertinent part:

No person shall ... contract for, or make an excavation ... in any public way, any public utility right of way or easement, or any privately owned land under which any public utility company, municipal utility department, natural gas pipeline company, or cable television company maintains underground facilities, including pipes, mains, wires or conduits, unless at least seventy-two hours, exclusive of Saturdays, Sundays and legal holidays, but not more than thirty days, before the proposed excavation is to be made such person has given an initial notice in writing of the proposed excavation to such natural gas pipeline companies, public utility companies, cable television companies and municipal utility departments as supply gas, electricity, telephone or cable television service in or to the city or town where such excavation is to be made. Such notice shall set forth the name of the street or the route number of said way and a reasonably accurate description of the location in said way or on private property the excavation is to be made If any such notice cannot be given as aforesaid because of an emergency, it shall be given as soon as may be practicable.

The Department has held that a contractor's notice must adequately name the street of the proposed excavation, and give a reasonably accurate description of the location where the excavation is to be made. Weston Geophysical Corporation, D.P.U. 89-DS-115 (1993); Boston Gas Company, D.P.U. 88-DS-3 (1990). The statute assigns to the company the responsibility to mark the location of all company facilities in the area of the proposed excavation.

Evidence of damage during excavation may be prima facie evidence of negligence on the part of an excavator unless such evidence is controverted by credible evidence, whereupon the mere fact of damage does not itself indicate a violation of the Dig-Safe Law. Yukna v. Boston Gas Company, 1 Mass. App. Ct. 62 (1973).

The next issue is whether the Respondent gave proper notice of the emergency situation at Rear 227 Bridge Road. Department precedent and the Dig-Safe Law state that in emergency situations, notice shall be given at the earliest possible moment, taking into account the urgency of

the emergency situation. 220 C.M.R. § 99.03 (1)(2); Toll Brothers, supra; Pepperell Water Company, supra. In the instant case, although no adequate evidence was presented by the Division that the Respondent failed to notify the Company as soon as possible in light of the emergency excavation, the Respondent admitted that he did not give notice as soon as possible before or during the emergency excavation. Accordingly, the Department finds that the Respondent failed to render proper emergency notice to the Company at the earliest possible moment, in violation of the Dig-Safe Law.

, thus placing the burden on the Division to show that a more reasonable and safer alternative method of excavation could have been used under the circumstances

Although the Division also alleged that the Respondent failed to use reasonable precautions in excavating the bush, it did not meet its initial burden by demonstrating other precautions that could or should have been taken. New England Excavating, supra; Fed. Corp., supra; Umbro & Sons, supra.

Further, in John Healy Company, the fixing of a broken water main that supplied water to fire lines for a large building may have been an emergency situation, but it was not found to be so because alternative means of obtaining water to supply the fire lines existed, and thus, no imminent threat to person or property existed. John Healy Company, D.P.U. 90-DS-48 at 6 (1992).

the lack of water situation may have threatened the public health by affecting the health of a baby living at Rear 227 Bridge Road and may have resulted in a loss of property, but these points were not sufficiently supported with evidence and testimony from the Respondent. The Department finds that although a loss of water to multiple residences may be an emergency situation requiring and emergency excavation, in the instant case, because insufficient evidence was presented by the Respondent to demonstrate such, no emergency excavation was authorized by 220 C.M.R.

99.02(a) or (b).

The last authorization for an emergency excavation involves an emergency excavation to ensure utility service. 220 C.M.R. 99.02(c). The leak of the water line may have required immediate and unanticipated attention, but unlike the situation in Boston Gas, in which the utility company was attempting to correct a gas leak to its own facilities and re-establish utility service, the instant correction was being performed by an excavator that was not employed by the water company to repair the water company's facilities. Unless employed by the utility company for the express purpose of repairing a facility, an excavator may not make an emergency excavation for purposes of ensuring or restoring utility service. See 220 C.M.R. 99.02(c). Therefore, the Respondent was not authorized to perform an emergency excavation for purposed of ensuring utility service.

In addressing whether the excavation of the driveway was an emergency, in Boston Gas Company, D.P.U. 86-DS-166, at 5 (1990), the Department found an emergency to exist when Boston Gas Company was attempting to determine the location of a gas leak. However, in that case, Boston Gas Company notified Dig-Safe before it excavated.⁹ In the instant case, the

Respondent did not claim **anywhere that the excavation of the bush and the driveway were emergency situations** or adduce evidence to support such a claim under the standard in 220 C.M.R. § 99.02. In addition, the Respondent admitted that it should have called for a Dig-Safe number before it excavated in the driveway. Accordingly, the Department finds that the Respondent has not established that this was a situation warranting emergency excavation under 220 C.M.R. § 99.02, **and therefore notice should have been given prior to excavation.**

In the instant case, the Respondent controverted the Division's contention by providing testimony that the only further precaution it could have taken in excavating in the middle of the driveway would have been to call Dig-Safe. Accordingly, the Respondent's failure to render proper notice and making of an excavation which caused damage to a company facility was not prima facie evidence of a failure to use reasonable precautions.

The final issue is whether the Respondent used reasonable precautions during the excavation in the driveway of Rear 227 Bridge Road. In order for the Department to justly construct a case against the alleged violator for a failure to use reasonable precautions while excavating, adequate support or evidence must accompany the allegation. Umbro & Sons, supra; Fed. Corp., supra. In addition, in specific instances where an allegation of a failure to exercise reasonable precautions has been made, the Division must also demonstrate further precautions

⁹ In addressing the excavation that took place in the middle of the driveway to stop the water leak, the Department **notes that in making it's determination as to whether an emergency excavation is necessary**, the Department looks to the governing statutes and regulations, which state that an emergency situation is one that: (1) causes an imminent threat to public health or safety; (2) **causes** a considerable and unanticipated threat of loss of physical property; and/or (3) requires an immediate and unanticipated correction to ensure utility service. 220 C.M.R. § 99.02.

that could or should have been taken. Fed. Corp., supra; Albanese Brothers, Inc., supra. In the instant case, the Division provided adequate evidence that a backhoe was used by the Respondent in the excavation and that the backhoe caused the damage to the Company's facility,¹⁰ but

¹⁰ Although the use of a backhoe may be inappropriate in many circumstances when used to excavate, the Department has found use of a backhoe to excavate to be reasonable when circumstances indicated such, or when the Division failed to provide reasonable alternative methods of excavation that could have been used. Umbro & Sons, supra; Fed. Corp., supra.